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No. 87-816

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

In re Lori G., a Person Coming
Under the Juvenile Court Law.

JOAN G.,
Petitioner,

v.

ORANGE COUNTY SOCIAL SERVICES AGENCY,
Respondent.

On Certiorari From the California Court of Appeal

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether, at a proceeding to terminate her parental rights, Petitioner was denied due process of law by the introduction, for a limited purpose, of evidence which would have been inadmissible as hearsay if not so limited.

Whether, at a proceeding to terminate her parental rights, Petitioner was denied the right to confront the witnesses against her by the introduction, for a limited purpose, of evidence which would have been inadmissible as hearsay if not so limited.

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Whether, at a proceeding to terminate her parental rights,

Petitioner was denied the right to confront the witnesses against her by the introduction, for a limited purpose, of evidence which would have been inadmissible as hearsay if not so limited.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Evidence 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Federal Rule of Evidence 705:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross- examination.

Federal Rule of Evidence 801(c):

Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

California Evidence Code Section 802:

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the mat-

ter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

California Evidence Code Section 1200(a):

"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

STATEMENT OF THE CASE

A. Course of Proceedings. Respondent adopts the statement of Petitioner.

B. Relevant Facts.

For purposes of this response only, Respondent adopts Petitioner's statement except as supplemented as follows: Therapist Joan Podrow, who treated Petitioner, testified that the Petitioner did not want to discuss the issue of the molest, so that she never made any significant progress in dealing with the issue of the molest. (T. 179)

Therapist Jean Harcourt-Smith, who treated the Petitioner, testified that the Petitioner denied the molest (T. 451, 476) and that the issue of the molest was never dealt with as completely as it needed to be. (T. 472)

Therapist Elizabeth Smith, who treated the Petitioner (and was called by Petitioner) testified that Petitioner denied the molest (T. 414, 415) and that their therapy never got past Petitioner's denial of the molest. (T. 416)

Therapists Podrow (T. 178, 179) and Harcourt-Smith (T.

459, 463) and Dr. Seaborn (T. 294) testified that it was an important first step in treatment of child molestation that the patient admit the molest.

SUMMARY OF ARGUMENT

1. **THE RECORD IN THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION OF DUE PROCESS OF LAW**

   A. No hearsay evidence was admitted over objection of the Petitioner.
   B. The record shows that all evidence admitted for a limited purpose comported with the rules of evidence and the requirements of due process.
   C. The record contains no basis for concluding that the evidence admitted for a limited purpose was considered by the Court for any other purpose.
   D. The record contains no basis for concluding that evidence admitted for a limited purpose was used by the Court as an unlimited basis for the termination of Petitioner's parental rights.

2. **THE INTRODUCTION, FOR LIMITED PURPOSES, OF EVIDENCE WHICH WOULD OTHERWISE BE INADMISSIBLE HEARSAY DID NOT VIOLATE PETITIONER'S ALLEGED FEDERAL CONFRONTATION RIGHTS**

   A. A proceeding to terminate parental rights is not a "criminal prosecution" within the meaning of the Sixth Amendment.
   B. Introduction, for a limited purpose, of evidence which would otherwise be inadmissible hearsay does not, in any event, deny the right of confrontation specified in the Sixth Amendment.

ARGUMENT

1. THE RECORD IN THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION OF DUE PROCESS OF LAW

A. No Hearsay Evidence Was Admitted Over Objection Of The Petitioner.

Petitioner's due process argument proceeds from the premise that "prejudicial hearsay evidence" was admitted. (Pet. for Cert. 25.) This premise is incorrect, in that *no hearsay evidence* was admitted over objection.

An out-of-court statement is hearsay only if it is offered for its truth. California Evid. Code Sec. 1200(a); Fed. R. Evid. 801(c); *United States v. Shepherd* 739 F. 2d 510, 514 (10th Cir. 1984).

Under California Civil Code Section 232(a)(7), Respondent was required to prove, in addition to the allegation of parental failure, that "reasonable services" had been offered by the Social Services Agency to attempt to reunify the family. To this end, the Agency introduced evidence of out-of-court statements made to Agency personnel for the *limited purpose* of showing what was *made known to and considered* by the Agency in formulating its Service Plan for this family. Such out-of-court statements were *not* introduced to prove the truth of the matters alleged.

The Agency presented the testimony of several mental health therapists and a psychologist, including their expert opinions concerning, *inter alia*, the mental and emotional state of the minor and of the Petitioner and the question of detriment to the minor if she were returned to the custody of Petitioner. The Agency introduced evidence of out-of-court statements made to these experts for the *limited purpose* of explaining the basis for their opinions, and not to prove the truth of the statements. (It should also be noted that the Peti-

tioner, during the direct examination of her own expert witness, introduced evidence of similar out-of-court statements for the same limited purpose.) (T. 490, 492-494)

B. The Record Shows That All Evidence Admitted For A Limited Purpose Comported With The Rules of Evidence And The Requirements Of Due Process.

Nowhere does Petitioner argue that the Agency attempted to offer such statements to prove the truth of the matter asserted. Instead, Petitioner argues that "the reasons offered for the introduction of the out of court declarations were invalid, and a subterfuge for bootstrapping hearsay statements into evidence." (Pet. for Cert. 25.) However, the record shows a valid legal basis for introduction of such evidence.

Under California law, evidence otherwise inadmissible as hearsay may be introduced for the limited purpose of showing the knowledge of a party in determining the "reasonableness" of that party's actions. *Gordon v. D&G Escrow Corp.* (1975), 48 Cal. App. 3d 616, 122 Cal. Rptr. 150; *Kelly v. State Personnel Bd.* (1979), 94 Cal. App. 3d 905, 156 Cal. Rptr. 795. The same rule is followed in federal proceedings, including criminal trials. *United States v. Lambinus*, 747 F. 2d 592, 597 (10th Cir. 1984), cert. denied, 471 U.S. 1067, 104 S. Ct. 2143, 85 L. Ed. 2d 500 (1985).

Similarly, evidence otherwise inadmissible as hearsay may be introduced for the limited purpose of showing the basis for an opinion expressed by an expert. California Evid. Code Secs. 801, 802; *Kelley v. Bailey* (1961), 189 Cal. App. 2d 728, 11 Cal. Rptr. 488. Again, the same rule is followed in federal proceedings, including criminal trials. Fed. R. Evid. 703, 705; *Fox v. Taylor Diving and Salvage Co.*, 694 F. 2d 1349, 1356, (5th Cir. 1983); *United States v. Sims*, 514 F. 2d 147, 149-150 (9th Cir. 1975), cert. denied 423 U.S. 845, 96 S. Ct. 83, 46 L. Ed. 2d 66 (1975).

In this case, the Agency's Trial Brief specified the lim-

ited purpose for which otherwise inadmissible hearsay would be offered. (Clerk's Transcript 2, 3.) Moreover, each question calling for such evidence was carefully prefaced with a statement as to the limited purpose for which it was offered (e.g., T. 81, 84, 134, 136, 137, 140, 219, 220, 223, 231).

As was noted in the opinion of the California Court of Appeal:

> "County counsel was very careful in his opening argument and continuing throughout the proceedings to notify the court certain evidence which might otherwise be [hearsay] would be introduced, not to prove the truth of the matter asserted, but to prove the mandates of section 232, subdivision (a)(7)." (Pet. for Cert. A-4, A-5.)

C. The Record Contains No Basis For Concluding That Evidence Admitted For A Limited Purpose Was Considered By The Court For Any Other Purpose.

Aside from the conclusory assertion that "no judge could put the hearsay evidence presented in this case out of his mind, or limit its application" (Pet. for Cert. 43.), Petitioner points to nothing in the record which indicates that the trial judge considered the evidence for any purpose other than the limited purpose for which it was admitted.

Indeed, such evidence as can be gleaned from the record indicates the trial judge was well aware of the limited use he could make of such evidence.

> "Mr. Meade: Offered for the limited purpose, not to demonstrate the truth, your Honor, but only to show what was made known to the Department of Social Services in this regard
>
> Q By Mr. Meade: What informa-

tion did you acquire from Miss Knapf regarding Miss Goodman's residence with her?

Mr. Donald: Objection, hearsay.

The Court: It's not being offered for the truth of the matter asserted." (T. 224)

D. The Record Contains No Basis For Concluding That Evidence Admitted For A Limited Purpose Was Used By The Court As An Unlimited Basis For The Termination Of Petitioner's Parental Rights.

Petitioner contends she was denied due process of law "by the introduction of 'hearsay' evidence which showed 'problems' that in part, formed the basis of the trial court's decision to terminate her parental rights." (Pet. for Cert. 2.) However, she points to no finding or conclusion of the trial court, or any other aspect of the record, which would support such conclusion.

The trial court had before it evidence that Petitioner had molested her daughter, had refused to address the molestation issue throughout lengthy therapy, and that it would be dangerous to return the minor to her. Given the weight of such evidence, the careful limitation of the introduction of the alleged "hearsay evidence" by counsel, and the awareness of the Court of the limitation on the use of that evidence, it is nothing but speculation to assert that the Court improperly based its determination of the termination issue on evidence admitted for a limited purpose.

2. THE INTRODUCTION, FOR LIMITED PURPOSES, OF EVIDENCE WHICH WOULD OTHERWISE BE INADMISSIBLE HEARSAY DID NOT VIOLATE PETITIONER'S ALLEGED FEDERAL CONFRONTATION RIGHTS

VAILABLE COPY

A. A Proceeding To Terminate Parental Rights Is Not A "Criminal Prosecution" Within The Meaning Of The Sixth Amendment.

By its own terms, the Sixth Amendment applies only to "criminal prosecutions." Petitioner asserts that a proceeding to terminate parental right is "criminal in nature" (Pet. for Cert. 43), drawing an analogy to the writ of habeas corpus. However, the analogy must fail, since it has been recognized that the provisions of the Sixth Amendment do not apply to habeas corpus proceedings. *Williams v. State of Mo.*, 640 F. 2d 140, (1981), cert. denied, 451 U.S. 990, 68 L. Ed. 2d 849, 101 S. Ct. 2328.

Petitioner asserts that the Sixth Amendment "should" apply to proceedings to terminate parental rights because of the "gravity of the penalty involved." (Pet. for Cert. 48.) However, even where the "penalty" involved has been as great as loss of personal liberty or residence, the courts have declined to apply Sixth Amendment provisions in the absence of a true criminal prosecution. *Gomez v. Miller*, 337 F. Supp. 386 (D.C. N.Y. 1971) (civil commitment); *Spencer v. Dixon*, 248 La. 604, 181 So. 2d 41 (1965) (contempt); *United States v. Parson*, 22 F. Supp. 149 (D.C. Cal. 1938) (deportation); *Dorsey v. Maschmann*, 571 F. 2d 1002 (C.A. Mo. 1977) (parole or probation revocation).

This Court has been invited to equate parental rights termination cases with criminal proceedings, and has declined to do so. *Lassiter v. Department of Social Services* (1981), 452 U.S. 18, 33, 68 L. Ed. 2d 640, 101 S. Ct. 2153 (due process held not to mandate appointment of counsel for indigent parent); *Santosky v. Kramer* (1982), 455 U.S. 745, 755-756, 71 L. Ed. 2d 599, 102 S. Ct. 1388 ("beyond a reasonable doubt" standard rejected in favor of "clear and convincing evidence" standard).

B. Introduction, For A Limited Purpose, Of Evidence Which Would Otherwise Be Inadmissible Hearsay Does not, In Any Event, Deny The Right Of Confrontation Specified In The Sixth Amendment.

This Court has held that the confrontation provisions of the Sixth Amendment are violated when out-of-court declarations are admitted in a criminal trial *as substantive evidence to prove the truth of the matters asserted therein. Pointer v. Texas* (1965), 380 U.S. 400, 407, 13 L. Ed. 2d 923, 85 S. Ct. 1065; *Barber v. Page* (1968), 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318.

However, when such evidence is admitted *for a limited purpose, other than proof of the matter asserted*, a defendant's right of confrontation is not denied. This is so whether the limited purpose is to show knowledge or intent (*United States v. Shepherd, supra*), or to demonstrate the basis for the opinion of an expert witness (*United States v. Sims, supra*).

CONCLUSION

Petitioner's primary assertion, that "hearsay evidence" was admitted over objection, is simply incorrect. Far from being "invalid and a subterfuge," the grounds on which evidence was admitted are well established in both state and federal law. The record is devoid of any indication that the trial court considered the evidence for any other purpose than the properly limited purpose for which it was admitted.

On this record, no substantial federal question is presented.

Respectfully submitted,

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